Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

BERK REALTY, INC., *Petitioner*,

v.

MERCER COUNTY TAX CLAIM BUREAU, *Respondent*.

On Petition for a Writ of Certiorari
To the Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

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17pp

QUESTION PRESENTED

Whether a state court's order for judicial sale of real property upon petition by local taxing authority filed beyond the state statutory deadline amounts to a denial of the property owner's due process of law under the 14th Amendment to the Constitution of the United States.

RULE 29.1 LISTING

Berk Realty, Inc., Petitioner, has no parent companies or nonwholly owned subsidiaries to list.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
REASONS FOR GRANTING PETITION	3
CONCLUSION	6
APPENDIX	
PA SUPREME COURT DECISION	1a
COMMONWEATH COURT DECISION	2a
STATE TRIAL COURT DECISION	5a

TABLE OF AUTHORITIES

Page

Cases

Continental Bank v. Frank, 495 A.2d 565 (Pa. Super. 1985)..... 5

Devlin v. Osser, 434 Pa. 408, 254 A.2d 303 (1969)..... 4

March v. Banus, 395 Pa. 629, 151 A.2d 612 (1959)..... 4

Jefferson Bank v. Newton Associates, 454 Pa. Super 654, 686 A.2d 834 (1996)..... 5

Statutes

28 U.S.C. Section 1257(a)..... 1

42 Pa. C.S. Section 5105(f)..... 3,6

72 P.S. Section 5860.616..... 2

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PETITION FOR WRIT OF CERTIORARI

Berk Realty, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania Western District entered on November 25, 1998.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania Western District (App., *infra*, 1a) is unreported. The opinion of the Commonwealth Court of Pennsylvania (App., *infra*, 2a-4a) is unreported. The opinion of the Court of Common Pleas of Mercer County, Pennsylvania (App., *infra*, 5a-7a) is unreported.

JURISDICTION

The judgment of the Commonwealth Court of Pennsylvania was entered on May 15, 1998. On November 25, 1998, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATEMENT

Berk was the owner of approximately 23 acres of industrial real estate located in Sharon, PA, which it purchased in 1985 for the sum of $425,000.00. It operated several businesses at that location from 1985 until the property was sold at a judicial sale conducted in January, 1998.

As a result of certain delinquencies of real estate taxes being owed by Berk, the local county taxing authority and Respondent, the Mercer County Tax Claim Bureau ("Bureau"), filed a petition for judicial sale with the Mercer County Common Pleas Court.

This petition was not timely filed and was filed almost two (2) years beyond the statutory deadline of 72 P.S. Section 5860.616 (App., *infra*, 2a-3a), as was admitted by the Bureau and determined by the state court in its Findings of Fact (App., *infra*, 6a).

The federal question was first raised by Berk when it filed a motion to dismiss the petition for judicial sale on the basis that the petition was untimely and that, as a result, the court did not have jurisdiction to entertain it. Berk also argued that the state statute must be strictly construed against the taxing authority "based upon the constitutional requirements of due process"; and that because tax sales are in derogation of the common law, failure of compliance with statutory provisions invalidates such sales.

The state court, without any taking any evidentiary testimony from the Bureau as to why it did not meet the statutory deadline, denied Berk's motion to dismiss on the grounds that it had no standing to raise the statutory deadline as a defense to the petition. The court also found that the statutory deadline, although missed, should not be construed strictly nor should it prevent the sale of the property.

Berk, thereafter, filed an appeal from the state court's order and was granted a stay of the sale conditioned upon the posting

of security in the amount of $150,000.00; which Berk was unable to post within the necessary time period. Upon the stay being lifted, the Bureau sold the property for $10,000.00 to a local economic development agency.

Following the sale of the property, and pending the appeal before the Commonwealth Court of Pennsylvania, the Bureau filed a motion to strike Berk's appeal as moot. The appeals court granted the Bureau's motion on the grounds that the appeal was moot since the property was had already been sold.

The appeals court also found that even if Berk would have been successful on the merits of its appeal, the court was prevented from setting aside the sale on the basis of 42 Pa. C.S. Section 5105(f) (App., *infra*, 4a).

REASONS FOR GRANTING THE PETITION

At the heart of this petition for writ of certiorari is the proliferation of cases in which tax sales are being conducted, in derogation of state statutes, which deprive owners of property their due process rights under the 14th Amendment to the Constitution of the United States. Moreover, the decisions below are erroneous, and the issues that they address are important.

The grave risk to due process protections is the *combined* effect of the state court and appeals court decisions. To the extent that these two decisions are permitted to stand in *pari materia*, a property owner will never have an opportunity for appellate review of a judicial sale, even if reversible error has occurred at the lower court level, when the taxing authority creates mootness through deliberate factual manipulation of selling the property. It is well recognized throughout most state jurisdictions, particularly Pennsylvania, that judicial sales almost always as a practical matter predate appellate review. As in the instant case, Berk could not reach the merits of its appeal because the sale of its property was erroneously considered by

the appeals court to moot all further appellate review. What exacerbates this unfair situation is the control that the Bureau had in controlling the facts by selling the property and then filing the motion to strike Berk's appeal. Such manipulation by a taxing body should not be permitted to stand. If such decisions are upheld, then anyone who owns property can never challenge the lower court's authority or jurisdiction in ordering such sale prior to consideration of the appeal. This issue is extremely important because it is capable of repetition yet escaping judicial review. In such cases, these appeals should not be dismissed as moot. Devlin vs. Osser, 434 Pa. 408, 254 A.2d 303 (1969).

I. The Decision of the Trial Court Is Erroneous

The trial court was wrong in determining that Petitioner did not have standing to raise the statutory deadline for the filing of the petition for judicial sale. The court reasoned that a delinquent taxpayer should not be permitted to use the mandatory deadline as a "shield" to prevent a tax sale. However, because tax sale statutes are in derogation of the common law, they should be strictly construed against the state and in favor of the taxpayer. Berk's use of the statute would not prevent the ultimate sale of its property. The statute would merely require that the Bureau conduct a new "upset tax sale", which would start the statutory deadline to begin to run again; thereby allowing Berk the opportunity of saving its property through the payment of taxes due. Berk had no opportunity to save its property and thus was denied due process of law.

The lower court cited the case of March v. Banus, 395 Pa. 629, 151 A.2d 612 (1959), in support of the duty of the government to collect its taxes and to protect it from long standing delinquencies (App., *infra*, 6a). However, a close reading of March also reflects on the protection of the delinquent taxpayer:

> "The purpose of tax sales is to collect taxes, not to drive a man from his property... And when the taxes may be collected and the property saved, consistent with due process, it would be an affront to the very concept of government to deny the property owner the opportunity to show that due process was not observed..."

The actions of the lower court, particularly in light of the fact that the Bureau did not call any witnesses to explain why it failed to meet the statutory deadline, require the Supreme Court's power of supervision. The lower court's ruling represented a complete departure from accepted and usual course of judicial proceedings, which should not be permitted by this Court.

II. The Decision of the Appeals Court Is Erroneous

The appellate court was wrong in its decision to consider Berk's appeal moot due to the intervening sale of its property by the Bureau. The appellate court incorrectly relied on the Frank case (App., *infra*, 4a) to justify its mootness conclusion. However, Frank is not controlling on the facts of the case and is not the law in Pennsylvania regarding the mootness issue. In fact, there is more recent case law in Pennsylvania that was ignored by the court in reaching its decision. In Jefferson Bank vs. Newton Associates, 454 Pa. Super. 654, 686 A.2d 834 (1996), the court held that the property owner's appeal was not moot even though the property sold and titles transferred:

> "Presently, appellees argue that this appeal is moot because titles to all condominium units at issue were transferred to third parties subsequent to appellant's filing of its notice of appeal. This is a specious argument, for it ignores the essential fact that, in the present

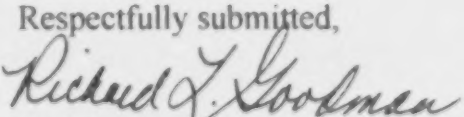
> appeal, it was appellees who transferred the properties after appellant took the appeal. This is a distinction with a difference, because our courts have never held that an adverse party may create mootness through deliberate factual manipulation" (at p. 838).

In the present case, the Bureau is the adverse party. It should not be able to create mootness.The court further erred in concluding that even if Berk were to be successful on the merits, the court could not set aside the sale based upon its reading of 42 Pa. C.S. Section 5105(f) (App., *infra*, 4a). Reliance on this section is misplaced. This section provides protection to a third party purchaser only if the court "has jurisdiction of the sale". Berk maintains that the trial court did not have jurisdiction to order the sale because of the late-filed petition. Thus, the appellate court never reached the issue of trial court jurisdiction, a necessary finding prior to reliance on 42 Pa. C.S. Section 5105(f).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: BERK REALTY, INC.,	: No. 393 W.D. Alloc. Dkt. 1998
	: PETITION FOR ALLOWANCE OF APPEAL
	: FROM ORDER OF THE COMMONWEALTH
	: COURT

ORDER

PER CURIAM

AND NOW, this 25th day of November 1998, the Petition for Allowance of Appeal is denied.

A True Copy Patricia Honard
As of: November 25, 1998
Attest: s/Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: BERK REALTY, INC., Appellant : No. 3552 C.D. 1997
: ARGUED: March 16, 1998

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE JOSEPH F. McCLOSKY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKY FILED: May 15, 1998

Berk Realty, Inc., (Berk), appeals from an order of the Court of Common Pleas of Mercer County (trial court), refusing Berk's motion to dismiss the petition for judicial sale of the Mercer County Tax Claim Bureau (Bureau).

Berk was the owner of property located at 700 South Dock Street in the city of Sharon, Mercer County, Pennsylvania. From 1990 through 1994, Berk failed to pay the real estate taxes on the property. The property was exposed to upset tax sale by the Bureau on September 28, 1994, and again on October 26, 1994[1]. The Bureau was unable to obtain sufficient bids to pay the upset price at either sale.

On September 5, 1997, the Bureau filed a petition for judicial sale. In response to this petition, Berk filed a motion to dismiss, alleging that the Bureau failed to meet the statutory deadline for such a petition[2]. The trial court refused

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[1] Before exposing the property to public sale, the Bureau fixed an upset price at $423,356.95.

[2] See Section 616 of the Real Estate Tax Sale Law (Law), Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. Section 5860.616 which states:

Berk's motion to dismiss and ordered the property sold[3]. The trial court also denied Berk's petition for a stay of its order.

Berk appealed[4] and once again petitioned for a stay of the trial court's order. By order of this Court dated December 31, 1997, the stay was granted, conditioned upon Berk's posting of security in the amount of $150,000.00. Berk was unable to post the security and the judicial sale proceeded. No bids were received at the sale and the property reverted to the Mercer County Repository for Unsold Property (Repository). In turn, the Repository then sold the property to a third party[5]. Following the sale of the property, the Bureau filed a motion to strike Berk's appeal as moot. By order of this Court dated February 17, 1998, the Bureau's motion to strike was listed for argument with the merits.

On appeal to this court, Berk has raised a number of issues for our review. However, because we conclude that the Bureau's motion to strike Berk's appeal should be granted, we need not reach the merits of Berk's arguments on appeal.

The subject property in the instant action has been sold and a new deed has been issued to and recorded by a third party. Berk argues that the case is not moot because, if it were to prevail on the merits of its appeal, the sale of the property

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> If within the period of ten (10) months after the date of the scheduled upset sale, the bureau has not filed a petition for a judicial sale under section 610 or the property has not been sold at a private sale, the Bureau shall, within the next immediately following two (2) months, file a petition for judicial sale of the property in the manner set forth in section 610.

[3] The trial court concluded that Section 616 of the Law was enacted for the purpose of placing the subject property back on the tax rolls and that a delinquent taxpayer has no standing under this section to prevent a tax sale and further delay the return of the property to the tax rolls.

[4] Berk erroneously appealed the trial court's decision to the Superior Court. By order dated December 23, 1997, the Superior Court transferred the appeal to this Court.

[5] On January 16, 1998, a deed for the property was issued to and recorded by the Sharon Abandoned Land Acquisition and Development Corporation.

would be set aside as void. However, case law and statutory law dictate against such a result.

The present case is analogous to the Supreme Court case of Continental Bank v. Frank, 495 A.2d 565 (Pa. Super. 1985). In Frank, the Superior Court refused to open a judgment after the subject property was sold to a third party. The Court reasoned that even if the judgment were opened, the appellant would not be entitled to repossession of the property. In support of its reasoning, the Frank court referred to Section 5105(f) of the Judicial Code, 42 Pa. C.S. Section 5105(f). This section reads as follows:

> The reversal or modification of any order of a court or any determination of any other government unit in a matter in which the court or government unit has jurisdiction of the sale, mortgage, exchange or conveyance of real property shall not impair or divest any estate or interest acquired thereunder by a person not a party to the appeal.

Id.

A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In re T.J., 699 A.2d 1311 (Pa. Super. 1997). Even if we determine that Berk should be successful on the merits of its appeal, such a determination would have no practical effect, as we are prevented by law from setting aside the sale of the subject property to a third party[6].

Accordingly, the Bureau's motion to strike appeal as moot is granted.

S/JOSEPH F. McCLOSKEY

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[6] Berk is not without remedy in the instant case. It has filed an action against the Bureau in the Court of Common Pleas of Mercer County, seeking damages in excess of $1,000,000.00.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY. PENNSYLVANIA
CIVIL ACTION – LAW

IN RE:

BERK REALTY, INC.: NO. 1997 – 3151

ORDER

AND NOW, November 21, 1997, the matter coming before the Court on a Motion to Dismiss the Petition for Judicial Sale (sic), the Motion to Dismiss is REFUSED.

The Rule issued September 5, 1997, is made ABSOLUTE.

The Court being satisfied that the Rule has been served upon the parties named therein as provided by law and the facts set forth in the Petition are true, IT IS ORDERED AND DECREED that the property described within the Petition shall be sold by the Mercer County Tax Claim Bureau on the 2nd day of January, 1998, at 10:00 a.m., or at such time thereafter as the Bureau may adjourn the sale, freed and cleared of all of its tax and municipal claims, liens, mortgages, charges and estates which were filed as of August 25, 1997, at 8:30 a.m., prevailing time, except separately taxed ground rents.

IT IS FURTHER ORDERED that the sale, the terms set by the Bureau, and the date thereof, shall be advertised in two newspapers of general circulation in the County of Mercer and in the Mercer County Law Journal at least thirty (30) days prior to said sale, and the beginning bid shall be $500.00.

Incident to this Order, the Court makes the following additional Findings of Fact:

FINDINGS OF FACT

(1) The subject property has delinquent taxes in excess of $700,000.00, no taxes having been paid on the property since at

least the calendar year 1990;

(2) The property was exposed to public upset tax sale on September 28, 1994, and continued to October 6, 1994. Under the time constraints set forth in 72 P.S. Section 5860.616, the Mercer County Tax Claim Bureau was required to file a Petition for Tax Sale under Section 5860.610 within 12 months of that date, to-wit: on or before October 26, 1995;

(3) The Bureau did not file such a Petition within the statutory deadline;

(4) That Berk Realty, Inc., is not a taxing body but is in fact the titled owner of the delinquent property.

CONCLUSIONS OF LAW

(1) The provisions of 72 P.S. Section 5860.616 for a mandatory tax sale are provided for the purpose of placing the subject property back onto the tax rolls;

(2) The time frame therein imposed upon the County by the Legislature creates standing in the local taxing authorities to require a county to act to replace the delinquent property on the tax rolls;

(3) A delinquent taxpayer has no standing under 72 P.S. Section 5860.616. This Statute is not a shield to a delinquent taxpayer to prevent a tax sale and thereby delay the property from being returned to the tax rolls. The very remedy which the delinquent taxpayer asserts would further frustrate the statutory scheme by barring the very tax sale which would replace the property on the tax rolls;

(4) The purpose of the statutory tax scheme of tax sales is to collect taxes and to protect local governments against willful, persistent and long-standing delinquent taxpayers. See, March v. Banus, 395 Pa. 629, 151 A.2d 612 (1959);

(5) Any other conclusion would be contrary to the rules of Statutory Construction that the Legislature does not intend a result that is absurd; and that the Legislature intends to favor the public interests as against any private interests. See, 1 Pa. C.S.A. Sections 1922(1), 1922(5).

BY THE COURT:
S/Francis J. Fornelli,
President Judge

Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

No. 98-1755

In The

Supreme Court of the United States

BERK REALTY, INC.,

Petitioner,

v.

MERCER COUNTY TAX CLAIM BUREAU,

Respondent.

On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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488

COUNTERSTATEMENT OF THE CASE

Petitioner, an Ohio corporate realty company, bought twenty-five acres in downtown Sharon, Pennsylvania, in 1984 for $400,000.00. It quit paying real estate taxes before 1990. After unsuccessful attempts by Respondent to sell it at tax sale in 1994, it was finally sold by judicial sale in 1997 when the tax deficiency had grown to then over $700,000.00. Petitioner attacked the judicial sale on the theory that under Pennsylvania law it should have been sold within one rather than three years of the unsuccessful tax sale. The trial court held that the delinquent taxpayer had no standing to so contend as the statutory purpose was to protect local governments against willful, persistent and long-standing delinquent taxpayers, rather than as a shield to such delinquents; and that the remedy asserted would further frustrate the statutory scheme. Petitioner appealed this to Commonwealth Court but failed to post a bond of $150,000.00 set by it to stay the sale, and the property was sold for economic redevelopment. That Court then dismissed the appeal as moot, and the Pennsylvania Supreme Court refused to allow further appeal.

Petitioner contends to this Court that the Pennsylvania courts erroneously applied Pennsylvania law and that it was denied due process in that it did not have a chance to save its property.

ARGUMENT

I. THE DECISION OF THE TRIAL COURT PERMITTING THE JUDICIAL SALE OF THE SUBJECT PROPERTY FOR DELINQUENT TAXES WAS CORRECT AND THERE WAS NO DENIAL OF DUE PROCESS.

The thrust of Petitioner's argument is that it "had no opportunity to save its property and thus was denied due process of law." (Petition for Writ of Certiorari, p. 4).

In fact, as found by the trial court without dispute, no taxes had been paid since at least 1990, attempted public upset tax sales in 1994 were unsuccessful, and the judicial sale which, when contested in 1997, occurred at a time when the delinquent taxes were in excess of $700,000.00 (p. 5a, 6a). Further, on its appeal to Pennsylvania Commonwealth Court, Petitioner was granted a stay of sale conditioned upon posting security of $150,000.00 which it did not do, and the judicial sale proceeded. Still no bids were received, so under applicable law the property reverted to the County Repository for Unsold Property which in turn sold it to a local economic development agency.

Therefore, Petitioner had every opportunity to save its property for years and years and failed to do so. It then further failed to effect a stay of the required sale. The property obviously had to be sold so that taxes would once again be paid.

II. THE DECISION OF THE PENNSYLVANIA COMMONWEALTH COURT OF APPEALS WAS CORRECT.

The Pennsylvania Commonwealth Court dismissed Petitioner's appeal to it as moot (2a). Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was then denied (1a). Petitioner now seeks this Court's further review as to whether Pennsylvania law was properly applied by its own appellate courts in this matter. The Pennsylvania Court's decisions in this case are clearly based on state law that is both adequate and independent and involve interpretation of a state statute by the state court. There is not a constitutional issue or any compelling reason to grant a Writ of Certiorari.

Further, the decision of the Pennsylvania Commonwealth Court was, as its opinion states, dictated by both Pennsylvania case law and statutory law (4a). Petitioner does not challenge the constitutionality of the involved statute (§5105(f) of the Judicial Code, 42 Pa. C.S. §5105(f)). If it did, the clerk would certify that fact to the state attorney general. 28 USCS §2403(b). Neither does Petitioner claim the right to a supersedeas without bond is constitutionally guaranteed.

Since the subsequent sale to a third party cannot be set aside, the appeal filed is moot. Finally, as the Commonwealth Court's opinion notes, Petitioner is not without remedy as it has filed an action seeking damages in excess of $1,000,000.00 (4a).

CONCLUSION

The Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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